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333.913 A RANCHERS PRIMER ON WATER RIGHT LAWS
C105 FOR MONTANA WATER USERS *

Water Right Laws

by



Judge W. W. Lessley, Judge of the 18th Judicial District

A Plain Language Explanation

This explanation has been prepared by your judge at your request. It makes no attempt to be a scholarly and legalistic approach to the subject. Its purpose is to state the elementary rules of water law in simple and plain language, that you may have a general knowledge of this most important property right. That does not mean it is not a statement of the law and does not follow the decisions of our Courts on the subject. It merely means, it contains general statements of that law in the language of the rancher. If you have a specific problem in water law, you should go to your lawyer, immediately, and get specific advice on your particular problem.

Right to Use

No one person owns an inch of water in the State of Montana. A person has a water right which gives him the right to use that water when he needs it. He does own the "use" of water. But his "use" is limited to a proper use of that certain amount of water. After he has made use of the water, the owner of that water right must turn it back into the stream for the benefit of others on the stream who also own a use, later in time to his. He cannot use his water for his own needs and then rent it, give it away or sell it. We come back to the fundamental rule that water right ownership is limited by use, by the rights of others on the stream and the amount of water in the stream. Your ownership of a water right is not like the ownership you have of your cows, horses, pigs, farm equipment, and cars and is different, even, from your ownership of land. As to your cows and cars you can kill, destroy, sell and use almost irregardless of the rights of others; it is as near absolute as any ownership can be. But your ownership of a water right is limited to the use and that use is in relation to the mount of water in the stream, the date of the water right, the needs on your land, and the relative rights of your neighbors on the same stream. This characteristic is a fundamental one of the doctrine of appropriation, which is the law in Montana.

Obtained by Appropriation

The common law doctrine of riparian rights does not apply here in Montana. As we stated above the doctrine of appropriation is the law of water rights here. That doctrine can be most simply explained in this way: A water

right is determined by time; the law puts it "first in time, first in right." There are two ways in which water may be appropriated in this State. The first, is by the rules and customs of the early settlers of this state; this is the method of a completed ditch for some useful or beneficial purpose. Suppose you had 200 acres of land of which 100 acres could be farmed and you could irrigate it from a particular creek; you could plow part of the 100 acres of land and start digging a ditch, say--on the 1st day of May 1886, and suppose you kept right on digging the ditch with "diligence" and finished it on April 1887. You would have an appropriation of 100 inches of water of the date of May 1, 1886; this by reason of a doctrine or rule of the law called, "relation back". The second is by the rule of posting as set out in the written law; this is the method of posting and filing notices. Here, you follow the written law, by posting a notice of your intention at the point of diversion (where you are going to take the water out), file a copy in the office of the county clerk and recorder within 20 days thereafter, and proceed with due diligence to put water on your land. And again, by the doctrine of "relation back" your appropriation will be of the date of the posting. In both methods of obtaining a water right the use of the water need not be immediate; it can be a prospective or contemplated use. You, of course, in both instances must control the land that needs the 100 inches (water is limited to actual necessity) but you need not own the land.

Decreed Rights

We have spoken of appropriated water rights. Now we shall discuss "decreed" water rights. One of the easiest ways to explain a decreed water right is to call it a "quick frozen" appropriated water right. Decreed water rights all come about as the result of a water suit, which is really a quiet title action of water rights on a stream, joined with an injunction (court order) restraining all parties to the decree from interfering with the water of the other parties. All the parties who use or claim the use of the water from a stream and its tributaries are brought into court; they are required to set up their claims to the use of the water. The court hears all this testimony (a small water suit can last for three or four months!) then examines and adjudicates and sets dates of priority of use of all the water on the stream and its tributaries. All of this, number of water rights, amount, date and who owns the use of the water right is set up in a court decree. When so established it can be enforced by the court through a contempt proceeding, through administration by means of an appointed water commissioner.

The Judge of the court concerned must, on petition of 15 percent of the water rights affected on a decreed stream, appoint one or more water commissioners to measure and distribute the water. Notice it is not 15 percent of the "water users" but 15 percent of the water rights; so a petition by one person who has 15 percent of the water rights on a particular stream may be sufficient. The water commissioner is an "arm of the court"; he takes an oath, furnishes bond, keeps record of his daily distribution of water, and can refuse to distribute water to those of you who fail to maintain your headgates and install proper measuring boxes or weirs.

Related to Other Rights

Once a water right is obtained by either of the two ways mentioned it is a right modified by the amount of the water in the stream, the rights of others on that same stream, and the needs of the owner of the water right. This water right that you own, however old it may be, gives you only the right to use the water when you need it. And this need is only to the extent of your actual need, and then you are obligated to turn it back into the stream from where it came so that your neighbors with later rights may have the use of their rights which are later in time. This is a two-way street; you have the same right against older water rights than your own.

Transfer of Right

Water rights are "appurtenant" to the land; appurtenant means attached; they are so attached to it and they will be transferred with the land, even though not specifically mentioned in the deed of the land, though a good lawyer will take care to see that it is mentioned. Of course, land can be sold without the water right, but it must be stated that this is what is done. A water right can be sold and conveyed by deed, but the person who buys it, buys it in relation to all the other water rights on that stream and the person who sells it cannot continue to use that water right after he has sold it. That should be clear, because if I sell you 100 inches of water and you use it, and I continue after the sale to use the same 100 inches of water sold, we have burdened the stream to the extent of an additional 100 inches of water and our neighbors who have a later water right to use will be hurt.

Change in Point of Diversion

While it is true that an earlier appropriator of a water right may change his point of diversion (place where he takes out the water) the place where the water is used or the purpose of the use, only and this is a most positive and rigid rule, if he does not in any way interfere with or cause harm to the other water users on the stream. Think that over for a while and you will see the close interrelation of water rights on a stream and the danger of change either by point of diversion, use or sale of water rights.

How you Can Lose Your Right

But your water right is such a right, that it continues indefinitely, unless it is lost in either of two ways. These are: 1st, by permitting an adverse use or, 2nd, by abandonment. It is not easy to explain these two legal concepts of adverse possession and abandonment to men who are not lawyers. But this we can say: The facts of each case will determine its outcome. Since our Courts have held that the right to use water is a property right or real estate (so much so that it passes with the land even if not mentioned in the deed) so it follows if a person uses your water right for 10 years (now changed to 5 years) adversely,

openly, continuously, uninterruptedly, notoriously and when you needed the water, he may acquire your water right by adverse use. Abandonment is even more difficult to apply to specific situations. It is a question of intent and act; and it does not depend on your failure to use the water for a certain number of years. You could lose your water right by abandonment in the period of 24, 48 or 72 hours. For example, suppose you went away and left the land on which the water was used, and at the time you left made known your intention to leave and to abandon the use of the water, and stated you did not intend to return. Just as length of time is not the controlling factor, a person might not use his water for a period beyond 10 years, but if that ten year period covered a time when there was no intent to abandon, no need for use of the water, still there would not be abandonment of the water right.

Ditch and Water Right are Separate

A ditch right and a right to use water (water right) are separate and distinct. The abandonment of one does not necessarily mean the abandonment of the other. There is a relationship between the ditch right and a water right that must be mentioned, and that is that the size of the ditch through which the water is conveyed and the amount of the water right, as determined by the person's needs and facilities, have a definite connection. So if the needs of the owner of the water right is larger than his means of diversion (ditch), then the size of the ditch limits the amount of the water he may use; if the size of his ditch is larger than the amount of water he needs for beneficial use, then his needs limit the amount of water he may use (of course, never more than his water right).

How Much Water

When we talk about the "duty of water" we speak of the amount of water reasonably necessary for the proper irrigation of a tract of land. In Montana, almost from the beginning of water law cases, it has been considered that in ordinary soil conditions, with an average length of ditch, that an inch of water per acre is the required amount. This is not a static thing and may vary in case of great seepage, evaporation, and land that is sandy and porous, and a long ditch, requiring more and then again in case of a large field under more favorable conditions requires less. But it is the standard in this State and any variations must be justified by the peculiar conditions then and there existing. "Inches" means, of course, miner's inches; the statutory rule in Montana as to measurement is cubic feet per second of time; a cubic foot of water is equal to 40 miner's inches. One cubic foot flowing 12 hours will amount to one acre foot, or enough water to cover one acre of land one foot deep.

Summary

1. A person with a water right does not own it; he owns only the right to the use of it. It is a property right and is protected by the law.

2. This ownership of the use of a water right means a person's use is for a beneficial purpose, use for proper irrigation, and to the extent of his legitimate need in each season, and in relation to the other owners of water rights on the particular stream.

3. Water rights are acquired in Montana in two ways: (1) by rules and customs of the early settlers; completed ditch for some useful and beneficial purpose; (2) by rules of posting and filing notice with the doctrine of "relation back."

4. Water rights can be lost in two ways: (1) Adverse use of (2) abandonment. Both adverse possession and abandonment are legal concepts and there is no rule of measurement; each determined on the particular facts.

5. A ditch right and a water right are separate and distinct rights. There is this relation, however, as to the amount of water that may be used; if the ditch is larger than the water right, then the needs measure the water, if the water right is larger than the ditch then the ditch measures the water.

6. "Duty of water" is the amount reasonably necessary for the proper irrigation of a tract of land. The standard accepted by our Supreme Court is one inch to the acre; there is, however, no magic in this and it may be more or less, depending on the local conditions.

7. The legal measure in our law books is cubic foot of water per second; a cubic foot equals 40 miner's inches.

